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No. 81-1839

IN THE

Supreme Court of the United States

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF OF APPELLEE MINNESOTA COMMISSIONER OF REVENUE

STATE OF MINNESOTA
WARREN SPANNAUS
Attorney General
PAUL R. KEMPAINEN
Special Assistant
Attorney General
Department of Revenue
Centennial Office Bldg.
St. Paul, Minnesota 55145
(612) 296-3421
Attorneys for Appellee

224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

1. Whether the provision in Minnesota's general sales and use tax law imposing a use tax on paper and ink is constitutional under the freedom of press guarantees of the first and fourteenth amendments, when both the language and history of the tax show it to be nothing more than a reasonable measure for the sole purpose of raising needed revenues, and when imposition of the tax is neither content-related nor restrictive of free expression.

2. Whether Minnesota's use tax on paper and ink purchased for use in the production of all "publications" not taxed when sold as final products (with an across-the-board exclusion for each publication of the first $100,000 of such purchases annually) is constitutional under the equal protection guarantee of the fourteenth amendment.

NOTE AS TO ABBREVIATIONS

Throughout this Brief, Appellee will use the following abbreviations:

"A. —" refers to pages in the Appendix to Jurisdictional Statement.

"JA. —" refers to pages in the Joint Appendix.

"Brief at —" refers to pages in the Brief of Appellant.

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STATUTES INVOLVED

Relevant provisions of the Minnesota statutes involved are set forth in the appendix to Jurisdictional Statement. (A. 70-90).

In addition Minnesota has issued a regulation interpreting the statutory language which is found in 13 Minn. Code of Agency Rules [hereinafter abbreviated as "MCAR"], Tax S&U 409. This regulation is reproduced in Joint Appendix P. (JA. 30).

STATEMENT OF THE CASE

This is a direct appeal by the Minneapolis Star and Tribune Co. [hereinafter "Star Tribune"] from the decision of the Minnesota Supreme Court upholding the constitutionality of the third paragraph of Minn. Stat. § 297A.14. The law is an integral part of Minnesota's general sales and use tax law and it imposes a use tax on the purchase of paper and ink used in the production of "publications" which are not subject to sales or use tax when sold as final products. The first $100,000 in annual purchases of paper and ink by each publication is excluded from the measure of the tax.

The facts pertaining to the history and setting of this use tax are important to the case and are essentially undisputed. When the Minnesota legislature first enacted the general sales and use tax in 1967, a tax was laid upon the sale or use of virtually all tangible personal property in the state of Minnesota. Minn. Stat. §§ 297A.02 and 297A.14 (1967). Notable exemptions were for food, medicine and clothing. Minn. Stat. § 297A.25, subd. 1, paras. (a), (b) and (g) (1967). In addition, sales of certain (but not all) publications, as well as the paper and ink which went into producing them, were statutorily exempted from the general sales and use tax. Minn. Stat. (1967) § 297A.25, subd. 1(i).

The category of exempt "publications" was statutorily defined to include, besides newspapers, such printed matter as magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books.[1] *See* 13 MCAR, Tax S&U 409B. (JA. 31). In

[1] The term "publication" is statutorily defined by Minn. Stat. § 297A.25, subd. 1(i), as any type of publication "regularly issued at average intervals not exceeding three months" including "a legal newspaper as defined by Minn. Stat. 1965, Section 331.02".

addition, monthly advertising circulars printed and distributed by wholesale and retail merchants have been construed to be tax exempt publications. *United Hardware Distributing Company v. Commissioner of Revenue,* 284 N.W.2d 820 (Minn. 1979).

Not included in the exemption for publications were such printed materials as books, political campaign newsletters and law briefs, all of which were subject to sales tax when sold as final products at retail. 13 MCAR Tax S&U 409B. (JA. 31).

The statutory class of exempt "publications" remained completely free from the sales and use tax until 1971. In that year the Minnesota legislature enacted a comprehensive tax reform measure which essentially shifted the burden of financing schools and other local government services from the local property tax to the state-wide sales and use tax, and the income tax. *See* Minn. Laws 1971, Ex. Sess., c. 31, parts of which are reproduced in the Appendix to the Jurisdictional Statement. (A. 70-82). One part of this reform measure amended Minn. Stat. § 297A.25, subd. 1(i), to remove the exemption which had previously been granted on purchases of paper and ink used in printing tax exempt publications. (A. 77-78). Thereafter, all producers of tax exempt publications in Minnesota had to pay a sales or use tax on the paper and ink which they purchased.

This tax remained in effect, unchallenged by any court proceeding, until the 1973 Minnesota legislature again amended the law effective January 1, 1974. Minn. Laws 1973, c. 650, art. XIII, §§ 1-2. (A. 84, 87). That amendment provided that in calculating the tax an across-the-board exclusion benefit of the first $100,000 in annual purchases would be given to each publication. In 1974, out of 388 paid circulation news-

papers in Minnesota (29 of which were daily papers), 11 publishers of daily newspapers paid the 4% use tax on their purchases of paper and ink above $100,000. (JA. 24-26). In 1975, out of 374 paid circulation newspapers in Minnesota (29 of which were daily papers), 13 publishers of daily newspapers paid the 4% use tax on their purchases of paper and ink above $100,000. (JA. 24-26). The record does not reflect the actual impact of the tax on other "publications" besides newspapers, such as advertising supplements, trade journals and serialized comic books.

Appellant Star Tribune is a company engaged in the business of printing newspapers, which are included in the class of exempt "publications" not subject to Minnesota's sales and use tax when sold as final products. (JA. 3 and 7). Under the statute in question, Star Tribune paid a use tax of $608,634 to Minnesota on its purchases of paper and ink in excess of $200,000 during 1974, and a tax of $265,631 for the period from January 1, 1975 through May 31, 1975. (A. 4, n. 3; A. 5, n. 4 and A. 6, n. 5).

No evidence whatsoever has been presented to show that, in enacting the use tax herein, Minnesota's legislature had any motive other than that of raising revenue; or had any sort of malicious or improper intent toward Minnesota's large-circulation newspapers, such as controlling their content or restricting their publication. Nor is there any evidence to show that the tax has had the effect of controlling content or restricting publication.

Star Tribune commenced this action in August, 1975, seeking a refund of the taxes it had paid. (JA. 3-6). On January 25, 1980, Star Tribune filed a motion for summary judgment. (JA. 8). On May 30, 1980, the state district court granted

summary judgment in favor of the Star Tribune declaring the use tax in question unconstitutional. (A. 49-66).

The Minnesota Commissioner of Revenue [hereinafter "Commissioner"] appealed that ruling to the Minnesota Supreme Court, which reversed the district court's decision on December 17, 1981. (A. 1-19). Star Tribune took a further appeal to this Court and probable jurisdiction was noted on June 21, 1982.

SUMMARY OF ARGUMENT

A. This is a clear case of a state tax law drafted to achieve the valid purpose of raising needed revenues, without impinging an iota upon the first amendment's basic interest in the free flow of information and ideas. Both the language of the statute and the facts of the case show that the tax is non-content related, non-regulative of the press, and non-restrictive of anyone's ability to print what he chooses. The history and setting of the basic use tax, first enacted in 1971 as part of a comprehensive tax reform act intended to improve the system of public education in Minnesota, and without the across-the-board $100,000 exclusion, reveal that its fundamental purpose was valid and that it was not intended as an attack on large newspapers. The tax is neither a license tax nor directly tied to circulation. Rather it was designed solely to raise revenue, and is thus one of "the ordinary forms of taxation" which can be imposed upon newspapers without infringing the first and fourteenth amendments. *Grossjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Unlike the situation in *Grossjean*, there is no evidence that Minnesota's tax resulted, or was intended to result, in a restriction on the free flow of ideas.

B. Since the tax in question is non-content related, proper resolution of the first amendment issue is through a balancing of the competing interests. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961). Those interests are Minnesota's need for revenue, fundamental to its government, and the first amendment's interest in the free flow of ideas. In performing this balance it is apparent that the tax does not actually suppress or regulate speech at all, but continues to allow complete freedom of communication by the press. Therefore, the basic interests protected by the first amendment are essentially unaffected and the balance must be resolved in favor of upholding the tax as a valid exercise of Minnesota's taxing power.

C. The Appellant's arguments under the equal protection clause are equally unavailing. The use tax is valid whether judged by the strict scrutiny standard or the more appropriate "any rational basis" test, which is the correct standard for review because this tax simply does not interfere with Star Tribune's exercise of first amendment rights, much less impermissibly so. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 311, 312 (1976). The commercial purchase of paper and ink is not a fundamental right, the protection of which demands application of strict scrutiny to an otherwise general sales and use tax law. As in *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946), which upheld a statutory classification between large and small newspapers without applying strict scrutiny, this case should be governed by the "any rational basis" test.

D. Whichever standard of review is applied, the classifications resulting from Minnesota's use tax are clearly valid.

Looking first to the basic tax, without the $100,000 exclusion benefit, it is apparent that the differences in Minnesota's general sales and use tax law between "publications", whose products are exempt from sales tax when sold at retail, and other industrial users of paper and ink, whose final products are subject to sales tax, are significant and justify a distinction. The cost of paper and ink used by non-publications is already taxed when the final product is sold at retail; their cost should therefore not be taxed again before that time. Exempt "publications" have no such problem, and in fact their burden is less under the use tax because it is figured on the wholesale price level. Star Tribune's complaint that producers of other exempt articles (like milk cartons and school textbooks) are not also subject to the use tax has no more merit than the suggestion that seamen and farm workers had to be included along with newspaper employees under the Fair Labor Standards Act. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 193 (1946). The Constitution does not require that all valid exemptions from a general law, each based upon distinct grounds, be revoked simply because a legislature has chosen to modify one of them for an otherwise valid purpose. Star Tribune's further contention that once Minnesota grants a sales tax exemption to newspapers it cannot, thereafter, impose any lesser tax fails as a matter of both logic and law. What the state has the power to grant it certainly has the power to take away, or modify. Likewise, Star Tribune's argument that the tax unconstitutionally discriminates in favor of foreign publications fails because Minnesota has no power to impose this use tax on foreign publications anyway. *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157, 162 (1940).

E. Finally, the $100,000 exclusion benefit does not create an impermissible classification. First, it applies equally to all publications. *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Second, since the $100,000 exclusion is not content related, it is not subject to the strict scrutiny applied to laws which are. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). The exclusion strikes a proper balance between the state's interest in collecting revenue under an equitable system and the first amendment's interest in a free flow of ideas. It provides relief to small publications who normally have less ability to pay, while at the same time decreasing the burden on larger publications. It is therefore a benefit given equally to all publications, not a penalty aimed at large newspapers. In any event, reasonable distinctions between large and small business, including publications, have long been upheld, and a primary purpose of the first amendment itself is to protect the small and impecunious publisher.

ARGUMENT

I. SINCE THE LANGUAGE AND HISTORY OF MINNESOTA'S USE TAX ON PAPER AND INK SHOW THAT IT IS SOLELY A GENERAL LAW, RATIONALLY RELATED TO THE SIGNIFICANT GOVERNMENT PURPOSE OF RAISING NEEDED REVENUES, AND THAT IT IS NEITHER CONTENT RELATED NOR RESTRICTIVE OF FREE EXPRESSION, THE TAX IS CONSTITUTIONAL UNDER THE FREEDOM OF PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Description Of The Tax And Its History.

At the outset it is important to recognize exactly what Minnesota's use tax on paper and ink does and does not do, as well as to understand the history and setting of the law. Ultimately, the tax simply raises needed state-wide revenues from a class of previously untaxed commercial purchase transactions, without discrimination as to the content of the publications taxed, and without any regulation of, or restrictions on, the first amendment's basic interest in the free flow of ideas and information.

Minn. Stat. § 297A.14 (1974), reads in relevant part as follows:

> For the privilege of using, storing or consuming in Minnesota tangible personal property, . . . purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail . . ., unless the tax imposed by section 297A.02 was paid on said sales price.
>
> . . . .

> Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section.

On its face, this statute does nothing more than extend Minnesota's general use tax to purchases of paper and ink by those who print a statutorily defined class of "publications".[2] This class of publications includes not just newspapers, but also, *inter alia*, magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books. 13 MCAR, Tax S&U 409(b). (JA. 31). Thus, the tax is aimed at a broad class of businesses.

Of course, not all industrial users of paper and ink, e.g. printers of books and legal briefs, are subject to the use tax on paper and ink. However, as will be explained in the discussion of the equal protection issue, Argument IIB, *infra*, those items are subject to sales tax when sold at retail.

The use tax on paper and ink is imposed at the same 4% rate applicable under Minnesota's general sales and use tax, and therefore cannot be raised without also raising the tax rate on all other businesses and persons subject to Minnesota's sales and use tax law.[3] The law provides an exclusion from

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[2] "Publications" are exempt from sales tax under Minn. Stat. § 297A.25, subd. 1(i) (1974), which is reproduced in the Appendix to Jurisdictional Statement. (A. 87).

[3] The general rate of tax on all businesses has now been raised to 5% for the two year period of July 1, 1981 to June 30, 1983. Minn. Laws 1981, First Sp. Sess., c. 1, art. IV, § 5.

taxation for the first $100,000 of paper and ink purchased. The exclusion is equally available to all publications, including Star Tribune which, in fact, received two exclusions—one for its morning and one for its evening editions—amounting to $200,000. (A. 4, n. 3; and A. 91).

This then is what the tax does. Equally important to a first amendment factual analysis is what the tax does *not* involve. First, its imposition is *not* content related in any way. On its face and as applied, Minn. Stat. § 297A.14 simply does not distinguish between any publication or other printed matter upon the basis of the subject matter contained therein. *Compare Heffron v. Intn'l. Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981), *with Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 536 (1980).

Second, the tax does *not* prohibit anyone from going into the business of printing a publication. The tax is not a license tax upon the privilege of printing or engaging in the business of printing a publication, thus distinguishing it on its face from the license taxes held invalid in *Grossjean v. American Press Co.*, 297 U.S. 444 (1936); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

Third, the tax does *not* vest discretion in any government official with regard to the laying or collecting of the tax. *Compare Cox v. New Hampshire*, 312 U.S. 569 (1941), *with Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Fourth, the tax does *not* represent any sort of regulation, attempted or actual, of the publication business. Under the law in question Minnesota does not even purport to have a say in how Star Tribune runs its business or what Star Tribune should print in the course of that business. *Cf., Miami*

Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974). Thus, Minnesota's law represents even less of an intrusion into the workings of the press than did the National Labor Relations Act upheld in *Associated Press v. NLRB*, 301 U.S. 103 (1937); the Fair Labor Standards Act upheld in *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); and the injunction against a newspaper's monopolistic advertising practices upheld in *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-156 (1951).

Finally, as the Minnesota Supreme Court noted in its opinion below, the law in question is *not* ". . . a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune." 314 N.W.2d at 207. (A. 12). The Minnesota Supreme Court based this conclusion on its review of the history and setting of the use tax, the essential facts of which are undisputed in this case. As stated by the Court below, that history began with the enactment of Minnesota's general sales and use tax law in 1967:

> The use tax challenged here is part of a system of sales and use taxes initially created by the state legislature in the Tax Reform and Relief Act of 1967. Act of June 1, 1967, ch. 32, art. 13, 1967 Minn. Laws Sp. Sess. 2143, 2177. The law then wholly exempted from use tax the gross receipts from the sale, storage, use or consumption of all tangible personal property, including paper and ink products, used in or consumed in any publication regularly issued at average intervals not exceeding three months. *Id.* § 25, subd. 1(i), at 2186. The publications themselves were also exempt from sales tax. *Id.* The

rate of sales and use tax was 3% at that time. *Id.* § 2, at 2179; § 14, at 2182.

314 Minn. at 203. (A. 3).

In 1971, however, a new need arose for additional state-wide revenues. In that year the Minnesota legislature had before it a comprehensive proposal for reforming the overall state and local tax burden. Simply stated, the plan called ". . . for the state to take over a large share of the school-financing burden from local districts, mandating a huge increase in the state budget." *See Minnesota: A State That Works*, TIME, August 13, 1973, pp. 24-35, at 35. This was a major social experiment for the state and the debate over it could not be concluded during the legislature's regular 1971 session.

Instead, the legislature was called into extra session, the result of which was the passage of Minn. Laws 1971, Ex. Sess., c. 31. (A. 70-82, partially reproduced only). A reading of that law reveals on its face that among the objects it sought to achieve were the large scale reduction of local property tax burdens, a corresponding increase in state aids to local governments and school districts to make up the difference, and a large scale increase in state-wide tax revenues to finance the program.

To help raise the revenue needed to fund this new program the legislature, *inter alia*, raised the overall sales and use tax rate from three to four percent, Minn. Laws 1971, Ex. Sess., c. 31, art. I, § 2 (A. 73-74), and repealed some previous sales tax exemptions. One of these repealers did nothing more than eliminate the previous exemption for paper and ink products used or consumed in the production of otherwise exempt publications. Minn. Laws 1971, Ex. Sess., c. 31, art. I, § 5. (A. 77).

Thus, as part of a large state-wide tax reform measure, the 1971 legislature simply imposed a use tax upon a class of previously untaxed property transactions for the valid purpose of funding a major new program of property tax reduction and local educational aid.[4]

This basic tax on paper and ink used in exempt publications remained in effect, unchallenged by any court action, until Minnesota again amended the law effective January 1, 1974. Minn. Laws 1973, c. 650, art. XIII, §§ 1-2. (A. 82-90, partially reproduced only). That statute did not repeal the use tax on paper and ink. Instead, the tax remained in effect with the proviso that the first $100,000 in purchases of paper and ink by any exempt publication was to be excluded from the measure of taxation. It is this provision, as amended, which was attacked by Star Tribune when it commenced the present lawsuit on August 26, 1975. (JA. 2-6).

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[4] The importance and success of this tax reform program was widely heralded, and it became popularly known as "The Minnesota Miracle" in providing equal educational opportunity to all Minnesotans. As described in *Minnesota: A State That Works*, TIME, August 13, 1973 at p. 35:

> With such state revenues [Minnesota] increased state aid for education from 43% to 63% in the first year, and now to 70%, thereby decreasing the real estate tax burden by an average of 11.5%.
>
> It was a major piece of social legislation, for within a six-year period, it will virtually equalize the per-pupil spending for education throughout the state and thus go a long way toward equalizing education in the cities, suburbs and rural areas.

B. Minnesota's Use Tax Does Not Have Any Of The Invalid Characteristics Of The Louisiana License Tax Found Unconstitutional In *Grossjean v. American Press Co.*

Throughout this case, chief discussion of the first amendment issue has revolved around the applicability of this Court's decision in *Grossjean v. American Press Co.*, 297 U.S. 233 (1936). Our analysis, therefore, starts with that case. In the beginning, let it be said that there is nothing in *Grossjean* with which the Appellee disagrees. It is clear that that case states sound principles of first amendment law. But it is equally clear that Minnesota's use tax on paper and ink contains none of the characteristics which *Grossjean* found unconstitutional in Louisiana's license tax.

Unlike Minnesota's use tax the tax at issue in *Grossjean* was directly tied to circulation; the statute on its face expressly applying only to publications having circulations in excess of 20,000 copies per week. 297 U.S. at 240. Thus, the Louisiana tax was bad because, in the words of this Court, "its *direct* tendency is to restrict circulation". (Emphasis added.) 297 U.S. at 244-245. In the case at hand, there is no such direct connection between Minnesota's use tax and size of circulation. The statute itself makes no reference to circulation at all, and while the amount of tax will go up with the volume of paper and ink purchased, this link to circulation is tangential at best.[5] It certainly is no more directly connected

[5] In its opinion below, the Minnesota Supreme Court correctly pointed out that on this record there was only a rough correlation between amounts of use tax paid and circulation. 314 N.W.2d at 204-205 (A.7); and that the $100,000 exclusion figure ". . . is only indirectly related to circulation, if at all. Consumption of

to circulation than, for example, the property tax, which can also be expected to increase when large circulation publications have to utilize buildings of greater size and value to accommodate their business. Or the gasoline and tire excise taxes, which increase when greater circulation requires larger fleets of delivery trucks.

Moreover, the *Grossjean* Court intended its comments about restrictions on circulation to be read literally and in context with the plainly abusive purpose of the Louisiana tax. This Court said:

> It [Louisiana's tax] is *not measured or limited by the volume of advertisements.* It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the *plain purpose* of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

297 U.S. at 251. (Emphasis added.)

This language indicates that taxes measured by some criteria other than circulation (as, for example, volume of sales or purchases) would have far less of an impact on the first amendment's basic purpose of preserving a widespread flow of information and ideas. Of course, Minnesota's use tax is measured solely by volume of paper and ink purchased, which

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paper and ink is tied to size and number of pages as well as quantity of copies". 314 N.W.2d at 208. (A. 15-16).

It should also be noted that the $100,000 exclusion does not represent a steeply graduated tax rate tied to circulation. Whereas in *Grossjean* the printing of even one newspaper over the 20,000 limit resulted in the full tax being imposed on all gross receipts, the Minnesota tax comes into effect only on actual purchases exceeding $100,000 (i.e. $1 over $100,000 results in only a 4 cent tax; $2 over $100,000 results in only an 8 cent tax, etc.). Circulation is not a criterion.

is purely a business act sufficiently removed from the actual dissemination of news and opinion.

Another clear difference between the present case and *Grossjean*, is that the Louisiana tax was on its face a license tax imposed only on publications for the privilege of engaging in the business of selling advertising. Minnesota's use tax on the other hand is not, and does not purport to be, a license tax of any kind. It neither prohibits nor regulates the conduct of any publication's business. Therefore, it is not a direct tax upon the exercise of a first amendment right. *Compare Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

Finally, an equally important difference between the present case and *Grossjean*, lies in the fact that the history and setting of Minnesota's use tax show it to be purely a revenue raising measure, with absolutely no purpose of penalizing the press, or restricting the free flow of information. This is a far cry from the Louisiana license tax, which the facts of *Grossjean* showed to be nothing more than a vehicle used by that state's political machine for the deliberate purpose of muzzling a select group of opposition newspapers.[6]

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[6] One of the facts before this Court in *Grossjean* concerning the legislative history of Louisiana's license tax was a circular placed on the desks of members of the legislature after introduction of the measure but before its final passage. It bore the names of Huey P. Long, then a U.S. Senator, and Governor Oscar K. Allen, who was Long's protege, and it read as follows:

> The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2 percent

This Court did not ignore that factual background, for it said:

> The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. *It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information* to which the public is entitled in virtue of the constitutional guaranties.

297 U.S. at 250. (Emphasis added.)

Subsequent decisions by this Court and other courts have long recognized that the plainly illicit purpose on the face of Louisiana's license tax was a chief reason for its unconstitutionality. In *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946), a case which upheld application of the Fair Labor Standards Act to a small daily newspaper while exempting small weekly and semiweekly newspapers, this Court said:

> The *Grossjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation.

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on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2 cents a lie.

Appellee's brief, *Grossjean v. American Press Co.*, p. 9.

Of course, there is not a single piece of similar evidence in the present case. The wishful attempt by *Amici* ACLU, MCLU and MCAC in their brief to construct some sinister conspiracy behind Minnesota's tax is nothing more than extra-record speculation.

> No such vice inheres in this legislation. . . . [T]he exemption of small weeklies and semiweeklies *is not a "deliberate and calculated device" to penalize a certain group of newspapers.*

327 U.S. at 184. (Emphasis added.)

In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), a case upholding an ordinance prohibiting newspapers from carrying sex designated help wanted ads, this Court recognized *Grossjean* as one of the leading authorities in the area, 413 U.S. at 382-383, but then distinguished it by saying quite simply:

> [N]o suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press.

413 U.S. at 383.

In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), this Court reiterated that:

> *Grossjean* involved a challenge to a state tax on advertising revenues of newspapers, the *"plain purpose" of which was to penalize the publishers and curtail the publication of a selected group of newspapers.*

438 U.S. at 9. (Emphasis added.)

See also Lee Enterprises v. Iowa State Tax Commission, 162 N.W.2d 730, 755 (Iowa, 1968); *Giragi v. Moore*, 49 Ariz. 74, 85-86, 64 P.2d 819, 823 (Lockwood, J., concurring), *appeal dismissed*, 301 U.S. 670 (1937); and L. Tribe, *American Constitutional Law*, § 12-5 at 593, n. 8, and § 12-31 at 724, n. 10.

Since neither the record in this case, nor the face of Minnesota's law, reveals a punitive purpose or restrictive intent behind the tax, and since the tax is neither tied directly to circulation nor constitutes a discriminatory license tax upon the business of publishing, it is clear that Minnesota's statute does not fall within the type of taxation proscribed by *Grossjean*.

Star Tribune's analysis of *Grossjean* consists of little more than an attempt to label Minnesota's law with the historical catch phrase "tax on knowledge". (Brief at 17-25).[7] However, this argument fails to find any factual support in the present case and is, moreover, based upon an overbroad reading of *Grossjean* itself.

There were only "two well-known and odious methods" of imposing "taxes on knowledge" which *Grossjean* condemned: (1) the stamp tax on newspapers, and (2) the English tax on advertisements. 297 U.S. at 246-247, 249. It was solely these "two forms of taxation already described", 297 U.S. at 248, which *Grossjean* held to be prohibited by the first amendment. Of course, Minnesota's use tax is neither a "stamp tax" on newspapers, nor a tax on advertisements, and Star Tribune has virtually conceded as much. (Brief at 21).

Instead, Star Tribune asserts that there was a third category of "taxes on knowledge", the English duty on paper, which the first amendment also intended to proscribe. (Brief at 19, 21). However, this Court in *Grossjean* never saw fit to mention this purported third category, and it is easy to

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[7] *Amici* ACLU, MCLU and MCAC do the same thing, and even go further by resorting to slogans in their brief such as the "big newspaper tax". This, of course, is inaccurate since the statute on its face and as construed applies to numerous types and sizes of publications besides "big" newspapers. *See*, Statement of the Case, *supra*, pp. 2-3.

see why in light of the fact that a general, non-discriminatory tax on paper would certainly not fall into the same class as the two English "taxes on knowledge". To hold otherwise would go far beyond the intended protections of the first amendment by prohibiting, *inter alia*, such ordinary forms of taxation as the federal import duty on paper imposed by Congress, apparently without constitutional challenge. *See*, e.g. *Arthur v. Moller*, 97 U.S. 365 (1878) (construing statutes imposing duties at varying rates on, *inter alia*, sized and unsized printing paper for newspapers). *See also Pott v. Arthur*, 104 U.S. 735 (1882). Today numerous types of paper, including certain types of printing paper, remain subject to federal customs duties, with newsprint being listed on the tariff schedule but specifically exempted from tax. 19 U.S.C.A. § 1202 (Tariff Schedule 2, Part 4). In short, neither the express language of *Grossjean*, nor America's own historical experience support Star Tribune's contention that a tax on paper is *ipso facto* a "tax on knowledge".

Perhaps the most objectionable feature of the English taxes, noted in *Grossjean*, but not present here, was that everyone knew that the taxes were intended to have, and had, the effect of abridging the circulation of newspapers. 297 U.S. at 246-247. Revenue was only a subordinate concern, if it was a concern at all. *Id.* Another objectionable feature of the English tax system was the gross inequality with which it was administered by officials who had virtually unfettered discretion. *See* 1 Collett, *History of the Taxes on Knowledge* (1899), 14, cited in 297 U.S. at 247. In contrast, the record herein shows no evidence of an intent to curtail the press, nor of such a result. And Minnesota's law leaves no room for discretion on the part of the officials who enforce it.

Instead of being a "tax on knowledge", Minnesota's use tax falls within the larger class of general, non-discriminatory

taxes which, although clearly imposed on the press, have nevertheless been upheld in the years since *Grossjean*. This line of cases began with *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819 (1937), *appeal dismissed*, 301 U.S. 670 (1937), which was a suit challenging an Arizona privilege tax on the sales of gross income from, *inter alia*, the business of publishing newspapers. The Supreme Court of Arizona upheld the acts as part of a general sales tax enacted for revenue raising only and without hostility to the press. This Court dismissed the appeal for want of a substantial federal question. *See also, Arizona Pub. Co. v. O'Neil*, 22 F.Supp. 117, *affirmed* 304 U.S. 543 (1938).

In *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368 (1947), *appeal dismissed*, 332 U.S. 749 (1947), a city ordinance imposed an annual business license tax upon newspapers, magazines and other periodicals or publications, based upon gross receipts, with a minimum tax of $10 per annum upon receipts from all sales and advertising, both wholesale and retail. The tax was graduated in nature because an additional $1.00 in tax was imposed for each $1,000.00 of gross sales over the first $3,000.00. The Supreme Court of Florida upheld the tax. An appeal to this Court was dismissed for want of a substantial federal question. *Compare City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943) (declaring an earlier city tax tied directly to circulation to be invalid).

In *City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953), a general municipal business license tax upon the business of newspaper publications was upheld. Similarly, in *Alaska v. Journal Printing Company*, 135 F.Supp. 169, 15 Alaska 676 (1955), the federal district court upheld an Alaskan business license tax imposed upon a newspaper which required an initial annual license fee of $25, plus a sum equal to 1/2% of the gross receipts of each business in excess of the first $20,000 in annual gross receipts.

In *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958), the well-known author and playwright John Steinbeck challenged the application to his profession of a general New York gross receipts tax upon the carrying on of any trade, business, profession, vocation or commercial activity wherein the gross receipts exceeded $10,000.00 per annum. His challenge was based in part upon freedom of the press grounds. However, the New York Court of Appeals upheld the constitutionality of the law, and this Court dismissed the subsequent appeal for want of substantial federal question. *Accord, Saltzman v. U.S.*, 516 F.2d 891 (9th Cir., 1975) (federal communications excise tax); *Lee Enterprises Inc. v. Iowa State Tax Commission*, 162 N.W.2d 730 (Iowa, 1968) (3% tax on newspaper advertising); and *Donnelly Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024 (1940) (occupational license tax).

C. Minnesota's Use Tax Meets The Balancing-Of Interests Test Applicable In First Amendment Cases When The Assailed Law Is Non-Content Related, Serves An Important Government Interest, And Leaves Full Opportunities For Free Expression By The Press.

1. The Balancing-Of-Interests Test Is Applicable In This Case.

While this Court has always recognized the important interests protected by the first amendment, it has never adopted a theory under which the rights protected by that amendment are considered as absolutes. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). The commercial press in particular, like every other business enterprise, has been held subject to the incidental burdens imposed by law which life in an organized society requires.[8] Thus, in *Associated Press v. NLRB*, 301 U.S. 103 (1937), this Court pointed out that:

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. *Like others he must pay equitable and nondiscriminatory taxes on his business.*

301 U.S. at 132-133. (Emphasis added.)

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[8] In *Cox v. New Hampshire*, 312 U.S. 569 (1941), Chief Justice Hughes remarked in the context of a first amendment case:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

312 U.S. at 574.

More recently, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court also said:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

408 U.S. at 682-683.[9]

In substance, Minnesota's use tax on paper and ink is just such an "incidental burden", imposed as part of a general sales and use tax law. Far from being an abridgment of press freedom, the tax is simply a non-content related method of raising needed revenues for the significant government purpose of funding Minnesota's public school aids program. *See*, Argument I A, *supra*. Under this Court's previous decisions such a law can pass constitutional muster if it meets the balancing-of-interests test.

The balancing-of-interests test evolved from the recognition that government usually abridges freedom of the press in one of two ways: (1) by directly restricting the content of the publication, or (2) by restricting the flow of information as

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[9] *Accord, Pittsburgh Press Company, supra*, 413 U.S. at 382-383. *Cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 565-566 (1978) (First amendment provides to newspapers no greater freedom from proper search warrants than that of the general public); *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) (First amendment grants the press no right to information about a trial superior to that of the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (The press has no first amendment right of access to prisons beyond that afforded the general public).

a side effect of attempting to achieve other purposes. *See* L. Tribe, *American Constitutional Law*, § 12-2 at 580. An example of a content related regulation is one which specifically prohibits particular statements as the primary objective. *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

The second kind of government action, non-content related, is typified by a governmental restriction aimed at achieving a legitimate objective of government, such as safety, health, or raising revenue, with an incidental effect on first amendment rights. Examples would be ordinances which prohibit the use of loudspeakers in residential areas or picketing near schools. *See Grayned v. Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

As to the content related type of law, there is a presumption that it is violative of the first amendment and, thus, must meet the highest standard of constitutional scrutiny. But, a governmental restriction not related to content is subject to a less stringent, balancing-of-interests test. *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961) (rules which only limit the performance of speech activities can be justified by countervailing governmental interests); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (rules not aimed at specific information are acceptable so long as they do not "unduly constrict" the flow of ideas).

The balancing-of-interests test has been stated in several ways. For example, when the issue is the validity of a reasonable time, place and manner regulation on a public forum, the regulation is justified if it is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. *Heffron v. Intn'l. Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-

648 (1981); *Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council*, 425 U.S. 748, 771 (1976). As this Court noted just last Term: "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech [citation omitted] would *not* be subjected to . . . strict scrutiny". *Globe Newspaper Co. v. Superior Court*, —— U.S. ——, —— n. 17, 102 S.Ct. 2613, 2620 n. 17 (1982). (Emphasis added.)

In cases such as the present one, where the content-neutral statute in question has a much less direct effect on communication than a "time, place and manner" regulation, this Court has adopted an even less rigid test in which it balances the first amendment interest in maintaining a free flow of communication and ideas against those governmental interests served by the statute. *U. S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981); *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).[10] In the *O'Brien* case, where this Court upheld the anti-draft card burning statute against first amendment attack, the following language was used in applying the balancing test:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

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[10] Professor Tribe notes that this balancing test requires only that the government "show no more than a rational justification" for its statute so long as there are ample means left available to communicate. L. Tribe, *American Constitutional Law*, § 12-20 at 684.

That Minnesota's use tax on paper and ink is content-neutral is beyond question. Therefore, it is constitutional if it can meet the balancing-of-interests test. To do so, the state need only show that: (1) the tax serves an important government interest that is within the state's constitutional power, and (2) the tax is unrelated to the suppression of free speech and, in fact, allows full opportunity of communication to the commercial press.

2. The Tax Serves The Important Government Interest Of Raising Revenue, Which Is Clearly Within The State's Constitutional Power.

In its opinion below, the Minnesota Supreme Court spoke of revenue-raising as "perhaps the most compelling goal of a state government." 314 N.W.2d at 207. (A. 13). This proposition is so obvious that it hardly needs supporting authority, for revenue is the very lifeblood of any government's operation. The raising of revenue clearly constitutes an important, significant and substantial government interest.

From the founding days of our Republic it has been recognized that revenues are essential to government. In *The Federalist No. 12*, p. 84 (Bourne ed. 1947) it was written that:

> A nation cannot long exist without revenues. Destitute of this *essential* support, it must resign its independence, and sink into the degraded condition of a province. This is an extremity to which no government will of choice accede. *Revenue, therefore, must be had at all events.*

(Emphasis added.) *See also The Federalist Nos. 31, 32 and 34.*

In *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527 (1931), this Court stated as a well settled principle that:

> The power of taxation is *fundamental* to the very existence of the government of the states.

283 U.S. at 537. (Emphasis added.)

Accord, United States v. Lee, —— U.S. ——, ——, 102 S.Ct. 1051, 1056 (1982) (The broad public interest in a sound tax system is of such a high order that even religious belief in conflict with payment of taxes affords no basis for nonpayment); *Providence Bank v. Billings*, 29 U.S. 514, 4 Pet. 514 (1830) (The taxing power is of vital importance and is essential to the existence of government).

Not only is taxation fundamental, but it is within the state's constitutional powers as "an incident of sovereignty". *McColloch v. Maryland*, 4 Wheat. 316, 429 (1819).

In short, revenue-raising is a substantial government interest because "Taxes are what we pay for civilized society". *Compania General de Tabacos v. Collector*, 275 U.S. 87, 100 (1927) (Justice Holmes dissenting). In the present case, this interest is even more compelling because the purpose behind Minnesota's taxation of paper and ink in 1971 was to help fund an important new program of local school aids aimed at creating equality of educational opportunity throughout the state. *See* Argument I A, *supra*.

It is constitutionally irrelevant to suggest that Minnesota could have obtained greater revenues from some source other than a use tax on paper and ink (Brief at 5-6), because the same argument can be made against all taxes that happen to affect publications. The taxing power extends to "All sub-

jects over which the sovereign power of a State extends", *McColloch v. Maryland, supra*; and if Minnesota were required to tax everything else in its jurisdiction before it could collect a tax from publications, then publications would never be subject to taxation. The Constitution clearly does not require such an extreme result. *Cf. Nixon v. Administrator of General Services*, 433 U.S. 425, 471 (1977) (Legislatures are not limited to "legislating for the universe, or legislating only benefits, or not legislating at all").

3. The Tax Is Totally Unrelated To Suppression Of Free Speech And Allows Full Opportunity Of Communication To The Press.

As previously shown, Minnesota's use tax on paper and ink is totally unrelated to any suppression of free speech. There is not a shred of evidence to show that the purpose behind this tax was to muzzle or otherwise intimidate the free press.[11] The law on its face neither prohibits nor regu-

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[11] Indeed, if that was its purpose Minnesota's use tax has been singularly unsuccessful in achieving it. The Appellant has neither suggested nor presented any evidence to support a conclusion that Minnesota's tradition of vigorously independent political reporting has in any way been diminished over the almost eleven years since the use tax on paper and ink was first enacted.

The inference in the brief of *Amici* ACLU, MCLU and MCAC, that the recent merging of the afternoon Star with the morning Tribune was somehow related to the passage over ten years ago of the use tax herein, is completely unsupported by anything either in this record or outside of it. In fact, the Star was still a viable profit-making operation when its management voluntarily decided to merge it with the Tribune. *See* Minneapolis Star, March 24, 1982, p. 5A, col. 2. Furthermore, the Star's merger can be attributed much more directly to the nation-wide problems facing all afternoon dailies (*see* Brief of *Amici* Knight-Ridder Newspapers, Inc. and ANPA, p. 2, n. 2), than to Minnesota's relatively modest tax.

lates the gathering, printing and dissemination of news and opinion. Nor is imposition of the tax dependent on either a government official's discretion, or the content of any particular publication.

The only requirement this tax places on any person or corporation wishing to commercially publish in Minnesota, is that they pay an ordinary use tax at the general rate when they purchase their supplies of paper and ink. This is no different than the case of an individual printing hand bills in his basement for free distribution, who has always had to pay sales or use tax on the paper and ink he buys in a retail store. No one could seriously argue that such an individual's first amendment right to print hand bills was being impinged. Likewise, a publication's right to print its product is simply not affected by a content neutral use tax on its commercial purchases of paper and ink. There is no reason to grant newspapers a "special" privilege under the first amendment, beyond that accorded to individual hand bill printers. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Chief Justice Burger, concurring).

Like any item of overhead, Minnesota's tax can simply be absorbed or passed-on as an ordinary cost of doing business. Thus, the tax is no more of a muzzle on the ability of the press to communicate than are ad valorem property taxes on a newspaper's buildings, gasoline and tire excise taxes on a newspaper's delivery trucks, or the federal communications excise tax on a newspaper's local telephone service (*See* 26 U.S.C. § 4251 and § 4253(b)). All these taxes are but incidental costs of conducting a business in today's commercial world, and are ordinarily borne by any publisher.

Consequently, when Minnesota's substantial interest in raising revenue for an important government program is

weighed against the minimal impact on the ability of publications to print news and information, it follows that the use tax in question does not violate the freedom of the press guaranteed in the first and fourteenth amendments.

II. MINNESOTA'S USE TAX ON PAPER AND INK IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION PROVISION OF THE FOURTEENTH AMENDMENT.

A. As A Non-Content Related Law Of General Application The Tax In Question Is Subject To The "Any Rational Basis" Standard Of Review, Even Though It Can Also Withstand Strict Scrutiny.

In its opinion below the Minnesota Supreme Court upheld Minnesota's use tax under the strict scrutiny standard of equal protection review. 314 N.W.2d at 205. (A. 8). Even though Appellee agrees with that result, we nevertheless think that the Minnesota Supreme Court went further than it was required to go. While the tax can survive strict scrutiny, it is not required to. The traditional "any rational basis" test is the only correct standard for review.

This Court has described the point at which traditional equal protection analysis gives way to the higher level of strict scrutiny by using different language in different cases. But perhaps the most common formulation is found in *Massachussetts Board of Retirement v. Murgia*, 427 U.S. 311 (1976):

> [E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification

> impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.

427 U.S. at 312.

Here there is no intimation that any "suspect class" is involved. Therefore strict scrutiny can be invoked only if it is shown that the use tax "impermissibly interferes with the exercise of a fundamental right." *Id.*

This, in turn, requires a finding that the thing being taxed, i.e. the purchase of paper and ink, is itself a fundamental right. We submit that it is not, for such purchases are simply part of the numerous business activities going into the commercial enterprise of printing a newspaper, or a trade journal, or a serialized comic book.

While Star Tribune undoubtedly has the fundamental right to print what it chooses, without content related regulation, it does not follow that all the business activities going into Star Tribune's enterprise are *ipso facto* fundamental rights. If that were true, *any* government regulation or taxation of those activities would be subject to strict scrutiny if there were the least bit of classification involved. Whether the law is an income tax, a property tax, fair labor laws or simply building codes, a commercial publication would likely avoid the law's effect altogether by simply shifting the burden of proof to the government and requiring it to show that one of its "compelling interests" can be served only by the particular statute in question. *Cf. United States v. Lee*, —— U.S. ——, ——, 102 S.Ct. 1051, 1057-1958 (1982) (Justice Stevens concurring).

Such a result is clearly not within the intent of the first amendment, for it is well settled "that the First Amendment

does not invalidate every incidental burdening of the press." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). This principle would be ill-served by a theory such as Star Tribune's, which essentially holds that everything a newspaper does is a "fundamental right", the taxation of which is always subject to strict scrutiny. Both Star Tribune and *Amici* place undue reliance on this Court's language in *Citizens Against Rent Control v. City of Berkeley*, —— U.S. ——, ——, 102 S.Ct. 434, 436 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review"). That case is distinguishable as involving a regulation directly aimed at limiting free speech. In contrast, Minnesota's use tax is even less restrictive of communication than the "time, place and manner" laws which this Court has often said would *not* be subjected to strict scrutiny. *Globe Newspaper Co. v. Superior Court*, —— U.S. ——, ——, n. 17, 102 S.Ct. 2613, 2620 n. 17 (1982).

We submit that the correct view of what is a fundamental right is one which recognizes the nature of the activity involved; analyzes the extent to which the activity is being affected (i.e. incidental, significant, or prohibitive), and determines how directly connected that activity is to the ultimate first amendment interest of insuring free communication of information and ideas. Since, in the present case, we have an ordinary business transaction (purchases of paper and ink), that is only indirectly related to actual communicative acts, being taxed under a general law that is both non-content related and non-prohibitive of the activity itself, it hardly merits treatment as a "fundamental" right.

Moreover, even if it were conceded, *arguendo*, that the commercial purchase of paper and ink is a fundamental right, under *Murgia, supra*, strict scrutiny is invoked only when the law "impermissibly interferes" with that right. The record herein fails to establish any substantial interference with Star Tribune's purchase of paper and ink, much less an impermissible one. A mere economic effect on newspapers does not mean the functions of the press are being interfered with. *Cf. United States v. New Mexico*, —— U.S. ——, 102 S.Ct. 1373, 1382 (1982) (Tax immunity is not conferred "simply because the tax has an effect on the U.S."); and *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 222-225 (1928) (Justice Holmes, dissenting).

In *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946), this Court was directly faced with an "equal protection" issue of alleged unconstitutional discrimination in the Fair Labor Standards Act, between small daily newspapers (who were held to be subject to the Act) and small weekly and semi-weekly newspapers (who were statutorily exempt under the Act).[12] In upholding the Act, this Court did not apply any sort of strict scrutiny standard of review, but in effect applied an "any rational basis" test. 327 U.S. at 184. *Accord Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 193-194 (1946). *See also Hadwen, Inc. v. Vermont Dept. of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed*, 451 U.S. 977 (1981), (Applying the "any rational basis" test in upholding Vermont's use tax on ink, newsprint and other supplies).

In short, Minnesota's use tax should not be subjected to strict scrutiny. The commercial purchase of paper and ink is not a fundamental right requiring constitutional protection of such magnitude. Instead, the any rational basis standard of review is clearly the correct one for this case.

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[12] Because the statute in *Mabee* was a federal law, the issue was raised under the Fifth Amendment rather than the Fourteenth Amendment. However, the standards of review under both Amendments are now recognized as virtually identical. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

B. In The Context Of Minnesota's General Sales And Use Tax Law, Imposing A Use Tax For Paper And Ink On Publications Whose End-Products Are Not Taxable, While Exempting Other Industrial Users Of Paper And Ink Whose End-Products Are Taxable, Is Not Violative Of Equal Protection.

Under Minnesota's sales and use tax system there is a substantial difference between publishers of tax exempt publications (who are subject to the use tax on paper and ink), and other industrial users of paper and ink. This difference lies in the fact that the cost of paper and ink used by ordinary manufacturers of non-exempt printed matter (e.g. pre-printed stationery, maps, books, etc.) is eventually subjected to sales and use taxation when the final product is sold at retail. Minn. Stat. § 297A.02. Therefore, it is reasonable to exempt the cost of such materials used in the industrial production of that product. Minn. Stat. § 297A.25, subd. 1(h). However, "publications" are different, because in Minnesota the end product is specifically exempted from sales and use tax. Minn. Stat. § 297A.25, subd. 1(i). Accordingly, paper and ink going into such publications is not, absent the use tax at issue herein, taxed at all.

As the Minnesota Supreme Court correctly stated in its opinion below:

> Nonpublishers pay no use tax on consumption of paper and ink, but the goods they produce are subject to retail sales tax. Theoretically, the value of the paper and ink is reflected in the retail price that forms the basis of the sales tax.
>
> . . . .
>
> By exempting industrial users from the use tax, the legislature was acting in accordance with its general

scheme to exempt component parts from the use tax when the completed product is subject to sales tax. 314 N.W.2d at 207-208. (A. 13).

Unlike paper and ink used in the usual manufacturing situation, paper and ink used for publications was exempt from taxation entirely under the statutory scheme in effect between 1967 and 1971. 13 MCAR Tax S&U 409(c)(1). (JA. 32). The tax in question simply removed this legislatively granted exemption in 1971. The sole reason for doing so was to raise revenue by providing that the cost of such paper and ink would be taxed once during the manufacturing process.

This clearly meets the any rational basis standard of review because a reasonable basis exists upon which publications and other industrial users of paper and ink are treated differently. The tax also meets the strict scrutiny standard of review because it serves the compelling state interest of raising revenue for an important state-wide program, *see* Argument I C(2), *supra*, with a non-content related classification that is suitably tailored to achieve its goal without impinging on the free flow of communications. *See Police Dept of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("As in all equal protection cases, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment").

It is hard to see how Minnesota's use tax can be a greater burden on "publications" than is the imposition of a sales tax upon the nonpublisher's sale of his final product. In fact, the burden is even smaller for tax exempt "publications" because the raw materials going into the product (i.e., paper and ink) are invariably of less value than the final product itself, therefore resulting in a lower overall tax burden. Even

under strict scrutiny there is no impermissible discrimination when the burden imposed upon one class (in this case, publications) is actually less than the burden imposed upon other classes. *California Medical Association v. Federal Election Commission*, —— U.S. ——, ——, 101 S.Ct. 2712, 2724 (1981).

Star Tribune continues to argue that a sales tax cannot be constitutionally imposed on newspapers under any circumstances, from which dubious assertion it then concludes that Minnesota cannot impose the lesser burden of the present use tax. (Brief at 34-41). In the first place, of course, the issue of whether there is a constitutionally mandated sales tax exemption for newspapers is not present in this litigation, as correctly noted by the Minnesota Supreme Court. 314 N.W.2d at 207, n. 10. (A. 13). *See also*, brief of *Amici* Knight-Ridder Newspapers, Inc. and ANPA, at 19-20. The reason is that the basic 1971 tax on paper and ink was not intended as a "compensating use tax," but was intended solely to raise revenue by removing a previous exemption. (A. 77).

But even if it were an issue in this case, there is simply no basis for such a constitutionally imposed tax exemption. Like almost all state sales taxes, Minnesota's sales tax is a general excise upon retail gross receipts from the sale of virtually all kinds of tangible personal property, with some rationally-based exemptions grounded in clearly permissible public policy (e.g., exemptions for food, clothing and school textbooks). Minn. Stat. §§ 297A.01, subds. 3 and 4, 297A.02 and 297A.25. Because newspapers are tangible personal property, they are as much subject to such a non-discriminatory, non-content related tax upon their sale as is any other item of tangible personal property.

Of course, Minnesota has chosen not to tax the sale of those newspapers which come within its statutory definition of "publications". Minn. Stat. § 297A.25, subd. 1(i). But this

does not mean that it was constitutionally required to do so.[13] Other states have taxed the sale of newspapers under their general laws, apparently without constitutional challenge, as noted by both the Minnesota Supreme Court, 314 N.W.2d at 207, n. 10 (A. 13), and *Amici* Knight-Ridder Newspapers, Inc. and ANPA in the appendix to their brief. Moreover, the question of a constitutionally required tax exemption cannot be confined to newspapers alone. We would also have to include such traditionally taxable items as books, legal briefs, catalogues, corporate reports, commercial handbills—in short, all other printed matter subject to first amendment protection—in the discussion, for there is little reason to believe the newspapers alone are entitled to "special" privileges under the first amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Chief Justice Burger, concurring). To say that this whole vast category of commercial enterprise is to be constitutionally exempted from general state sales taxes would go far beyond what the framers of the first and fourteenth amendments ever intended.

In *Cammarano v. United States*, 358 U.S. 498 (1959), no less a defender of the first amendment than Justice Douglas concurred in holding that money spent by businesses to defeat proposed initiative measures could not be deducted for income tax purposes as "ordinary and necessary" business expenses. Even though Justice Douglas was of the opinion that the taxpayers were exercising their first amendment rights, he rejected the notion that they were thereby constitutionally entitled to the deductions:

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[13] Nor did the Minnesota Attorney General's Opinion (1948 Op. Atty. Gen No. 90, June 11, 1948), cited by *Amici* ACLU, MCLU and MCAC on p. 53 of their brief, require such a result. That opinion simply said that a proposed city excise tax imposed on newspapers *alone*, and not upon all businesses generally, would be invalid.

> Deductions are a matter of grace, not of right. . . . To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a motion runs counter to our decisions.

358 U.S. at 515 (Justice Douglas, concurring) (Citations omitted). *Cf. Bob Jones University v. Simon*, 416 U.S. 725, 748-749 (1974).

Because there is nothing in either the first or fourteenth amendments which would prevent a state from imposing a non-discriminatory, non-content related sales tax on publications, we fail to see how the imposition of a lesser tax on only their purchases of paper and ink can be unconstitutional.

Star Tribune also argues that there exist other industrial users of paper and ink (e.g., printers of milk cartons and school textbooks) whose final products are exempt from sales tax, but who are not subjected to the use tax on paper and ink. (Brief at 49). However, Minnesota is not constrained to exempt all items of property from taxation, or none at all. Tax exemptions are not all in one class. Rather, each rests upon a different basis and legislatures have long had broad power to grant exemptions for the purpose of "fitting tax programs to local needs in order to achieve an equitable distribution of the tax burden". *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Thus, Minnesota is permitted to decide that its common good would be enhanced if certain items such as food (and the packaging for food), and school textbooks, remain totally exempt from its sales and use tax, without at the same time giving up its right to lay some tax on publications under an otherwise general tax system. For a similar treat-

ment of this issue, see *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), where this Court dismissed out-of-hand an argument that the exemption of seamen and farm workers, but not newspaper employees, from the Fair Labor Standards Act resulted in an unconstitutional discrimination against newspapers. 327 U.S. at 193. *See also, Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

C. There Is No Unconstitutional Discrimination In The Fact That Minnesota's Use Tax On Paper And Ink Cannot Be Imposed On Foreign Publications.

One of Star Tribune's more novel arguments is that Minnesota's use tax unconstitutionally discriminates in favor of foreign publications, who do not have to pay the tax because they do not buy their paper and ink in Minnesota. (Brief at 46-47). This line of reasoning, of course, completely fails to take into account the possibility that foreign publications may be paying business taxes in their home states above and beyond the taxes Minnesota imposes on its domestic publications. Even if they are not paying such taxes now, foreign publications are at any rate subject to such impositions by their home states at any time.[14]

However, the more fundamental response to Star Tribune's argument lies in the fact that Minnesota simply has no power to impose its use tax on the foreign purchase of paper and ink by reason of the due process clause of the fourteenth amendment. If this is a discrimination at all, it is not of Minnesota's doing; but rather is a natural product of our federal system, where states may only tax that over which they have jurisdiction.

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[14] *See, e.g.*, the New York City General Business and Financial Tax upheld in *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1 (1958), *appeal dismissed*, 358 U.S. 39 (1958).

In *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157 (1940), the taxpayer railroad made a similar equal protection argument in challenging Minnesota's railroad gross earnings tax. The railroad claimed that its nominal trackage in Minnesota (only 30 miles) subjected it to the gross earnings tax, while other foreign railroads having no trackage in Minnesota paid no tax even though they earned substantial revenues from rentals of cars for use in Minnesota. 309 U.S. at 162. This Court rejected that argument in succinct fashion, saying:

> As to appellant's second objection under this head, little need be said. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do, are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state, as are domestic companies engaged in that business. The fact that that entails burdens is a part of the price for enjoyment of the privileges which Minnesota extends.

309 U.S. at 163-164.

The decision in *Illinois Central R. Co.*, is dispositive of Star Tribune's argument on this point.

D. The $100,000 Exclusion Provision Does Not Violate Equal Protection Because It Is In Effect A Non-Discriminatory Tax Credit, Which Is Non-Content Oriented, And Reasonably Related To A Substantial Government Purpose.

The $100,000 exclusion added to the tax in 1973 is, on its face and in substance, a non-discriminatory provision which applies equally to all producers of tax exempt publications.

In effect, it is a $4,000 tax credit generally applicable to all taxpayers who come within the act.[15] Each producer of a publication, large or small, is entitled to subtract the same $100,000 from its cost of purchasing paper and ink before calculating the amount of use tax due. In fact, Star Tribune received two such $100,000 exclusions, one for its morning and one for its evening edition. 314 N.W.2d at 203, n. 3. (A. 4).

Moreover, the $100,000 exclusion is available totally without reference to the content of any particular publication. At the outset, then, the $100,000 exclusion can be set apart from the content related classifications struck down by this Court under the strict scrutiny standard of review in cases such as *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Nor is the exclusion prohibited under any reading of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) on the ground that size alone is an invidious discrimination. As this Court held in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946):

> Nothing in the Grosjean case forbids Congress to exempt some publishers *because of size* from either a tax or a regulation which would be valid if applied to all. 327 U.S. at 194. (Emphasis added.)

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[15] In this regard it is not unlike the political contribution tax credit of $50 ($100 in the case of joint returns) allowed against the federal income tax by 26 U.S.C. § 41. Small contributions of $50 or less get full advantage of the tax break, whereas larger contributors only get the same advantage up to $50, but thereafter get no tax benefit with regard to larger contributions. To our knowledge this credit has never been challenged on either equal protection or First Amendment grounds.

When the $100,000 exclusion is recognized for what it is, a content-neutral rule equally applicable to all publications, it can hardly be thought an arbitrary or invidious discrimination violative of the fourteenth amendment. As is the case with all general rules of taxation, it is possible that its application to different persons will result in different tax liabilities. But this does not, in itself, make the general rule unconstitutional. The fourteenth amendment guarantees only equal laws, not necessarily equal results. *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). *See Mouledoux v. Maestri*, 197 La. 525, 2 So.2d 11, 21 (1941) (sales and use tax graduated by size of purchase upheld because the cut-off points applied equally to all).

The fact that the $100,000 may result in a graduated tax rate is irrelevant, so long as the rule applies equally to all. In *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935), this Court upheld a West Virginia chain store license tax which was even more steeply graduated than Minnesota's use tax. That tax was imposed on each store at the rate of $2 for one store, $5 for two to five stores, $10 for six to ten stores, $20 for ten to fifteen stores, $30 for fifteen to twenty stores, $35 for twenty to thirty stores, $100 for thirty to fifty, $200 for fifty to seventy-five, and $250 on each store in excess of seventy-five. The net result of these graduated rates was that the five largest chain store operations in West Virginia, all owned by oil companies, accounted for 83.5% of the total license taxes paid to the state in one year, and the Standard Oil Co. alone paid 42.16% of the total state tax. 294 U.S. at 92. In rejecting the claim that West Virginia's tax was a violation of equal protection because of its varying impact, Mr. Justice Cardozo wrote for the Court:

> We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for everyone. *If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.*

294 U.S. at 102. (Emphasis added.)

Such is also the case with the $100,000 exclusion provision in Minnesota's use tax. It is a rule applicable to all members of the same class, and if the course of successful commercial enterprise causes some publications within that class to purchase more than $100,000 in paper and ink per year, the resulting tax is due solely "to the exigencies of business and not to those of law". *Id.* 294 U.S. at 101.

In addition to being non-discriminatory on its face, the $100,000 exclusion is also reasonably related to the substantial government interest of raising revenue within an equitable tax system, while at the same time advancing the first amendment's own special concern for "the poorly financed causes of little people" *Martin v. Struthers,* 319 U.S. 141, 146 (1943). *Cf. Associated Press v. United States,* 326 U.S. 1 (1945) (application of Sherman Anti-Trust Act to news media justified to prevent large combinations of publishers from driving out smaller publishers).

The $100,000 exclusion is an integral part of the basic use tax, and is intended to be part of an equitable and sound tax system. As the Minnesota Supreme Court aptly said below:

> [I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order

> to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state.

314 N.W.2d at 209. (A. 17 to A. 18).

Even under strict scrutiny the state has, as a corollary to its compelling interest of raising revenue, an equally compelling interest in seeing that its revenue is raised under an equitable system of taxation so as not to subvert the revenue raising purpose.

One reason behind the $100,000 exclusion was expressly mentioned by the Court below:

> [A] use tax exemption for the first $100,000 of paper and ink consumed may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered).

314 N.W.2d at 209. (A. 17).

The $100,000 exclusion is a benefit, not a penalty. Furthermore, it is non-content related and non-regulative. Therefore, its validity should be judged by the same criteria as other benefits granted by government to small businesses. No one can seriously argue that the federal Small Business Administration would be precluded from granting a loan on favorable terms to a small publisher, simply because it does not also grant loans to large media corporations like the Star Tribune. Likewise, Minnesota is not constitutionally prevented from lessening the tax burden on smaller publications through an across-the-board exclusion of $100,000, a benefit that is, in any event, equally applicable to large publishers.

Another justification for the exclusion is that larger businesses, by their nature, impose more social costs than do small business operations. The state therefore has a reasonable basis for imposing upon large business a greater tax burden to defray such costs. *Cf. New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 583 (1938) (Justifying a gross receipts tax because "the volume of transactions indicated on the taxpayer's books may bear a closer relation to the cost of governmental supervision and protection than the annual profit and loss statement").

Yet another reason for the exclusion is that larger businesses have more assets and receive greater revenues than smaller businesses. Thus, they would be better able to pay the tax and either absorb or pass on the cost. Ability to pay has long been accepted as a ground for distinction in tax law.

Finally, large publishers are more likely to be located in highly populated metropolitan areas (*see* Affidavit of Shaw, para. 8, JA. 26) which provide both high circulation and advertising revenue possibilities. On the other hand, small newspapers are often located in predominately rural areas where circulation and advertising possibilities are more limited. The tax collected from many of them would be virtually *de minimus*. Because these two groups serve two different kinds of constituencies, they are not in direct competition with each other. Giving an equal tax credit to both classes simply will not result in one's voice being enhanced over the other.

This is why Star Tribune's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976) is misplaced. As the Minnesota Supreme Court accurately noted:

> *Neither the purpose nor the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper.* The expenditure limitations found un-

> constitutional in *Buckley* were restrictions upon the total amount of money that could be spent by persons during a campaign. Such limitations were "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. *By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount.* The use tax may theoretically reduce the amount of money they may spend by reducing available capital. But all taxes do as much. There is nothing special about this form of taxation which elevates to a constitutional plane these theoretical effects on "quantity" or "diversity."

314 N.W.2d at 210. (A. 18 to A. 19). (Emphasis added.)

As mentioned earlier, the $100,000 exclusion is far more comparable to the $50/$100 political contribution credit found in the Internal Revenue Code than it is to the "independent expenditure" limits in *Buckley v. Valeo, supra,* which this Court found to be "*direct* and *substantial* restraints on the quantity of free speech." (Emphasis added.) *Id.* 424 U.S. at 39. The $100,000 exclusion is neither a direct nor substantial restraint of actual communicative acts. It is but an across-the-board credit available to all publishers, large and small. Nor is the exclusion a "penalty" as implied by Star Tribune. (Brief at 30-31). Receiving a credit of $4,000 on one's tax bill ($8,000 in the case of the Star Tribune) simply cannot be considered a "penalty" under any definition of that term.

Star Tribune's further contention that *Stewart Dry Goods v. Lewis,* 294 U.S. 550 (1935) is applicable herein, Brief at 31-33, is also misplaced, because that case dealt with a tax totally different from the one at issue herein. In *Stewart Dry Goods,* the tax was on the privilege of doing business as a retailer,

measured by gross receipts. The Court held that the purported justification for the graduated nature of tax (e.g. the value of the business privilege increasing with volume of sales) did not bear any relation with the actual tax. Minnesota's use tax however is not based upon the ongoing privilege of doing business. Nor does it purport to tax the profitability of a business. It is simply a one-time tax upon each act of purchasing and using tangible personal property, in the same manner as is the rest of Minnesota's general sales and use tax.

Moreover, the continued validity of the rigid grounds upon which *Stewart Dry Goods* was decided is today open to serious question in view of this Court's more recent view of the need for allowing flexibility in fashioning state tax systems. *See e.g. Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-527 (1959). Indeed, the *Stewart Dry Goods* opinion itself has hardly been mentioned again by this Court except to distinguish it. *See New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 583-584 (1938). *See also* Nowak, Rotunda and Young, *Constitutional Law* (1978) p. 364 ("An objective appraisal of *Stewart Dry Goods* leads one to doubt whether the majority view would prevail today").

Thus, it is entirely appropriate to suggest that the views of the three dissenters in *Stewart Dry Goods* (Justices Cardozo, Brandeis and Stone) represent today's more enlightened attitude toward fourteenth amendment state tax cases:

> The large dealer, it is said, occupies, both absolutely and relatively, a position of economic superiority by reason of the volume of his business. In that view, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the

> end at a more genuine equality. By the statute in controversy the commonwealth of Kentucky is aligned with that position. It is not the function of a court to make itself the arbiter between competing economic theories professed by honest men on grounds not wholly frivolous.

294 U.S. at 569. (Justice Cardozo dissenting).

To the extent that the $100,000 exclusion in this case cannot be distinguished from the tax in *Stewart Dry Goods*, we respectfully submit that now is the time for *Stewart Dry Goods* itself to be overruled, thereby finally setting aside the pre-1937 notion that this Court should be in the business of second-guessing legislatures on the economic theories underlying their legislation. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (Legislatures, not courts, should decide on the wisdom and utility of legislation).

CONCLUSION

For the reasons stated herein, the judgment of the Minnesota Supreme Court should be affirmed in all respects.

Respectfully submitted,

STATE OF MINNESOTA
WARREN SPANNAUS
Attorney General
PAUL R. KEMPAINEN
Special Assistant
Attorney General
Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
(612) 296-3421
Attorneys for Appellee